IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO (HMA)No. 349 of 2001

Judgment reserved on:14.9.2007

Date of Decision: October 5, 2007

Maya Ram ..Appellant

Versus

Smt. Kamla Devi … Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting?

For the Appellant : Mr. Subhash Sharma, Advocate.

For the Respondent(s) : Mr. Bhupender Gupta, Sr. Advocate with Mr. Praneet Gupta, Advocate.

Deepak Gupta, J.

The appellant/husband filed a petition under Section 12 read with Section 12(2)(b)(i) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) seeking decree for annulment of marriage between him and the respondent/wife.

The main ground raised in the petition was that a female child was born to the respondent/wife within 6 months after the marriage after the normal period of pregnancy and therefore, according to the husband, it was apparent that the wife was pregnant at the time of marriage from some other person and this fact was not disclosed to him. The respondent/wife contested the

case mainly on the ground that the child which was born was a premature child and according to her, the child was born from the loins of the husband. The learned District Judge rejected the petition filed by the husband mainly on the ground that in view of Section 112 of the Indian Evidence Act the paternity of the child could not be called in question.

The Court below came to the conclusion that the husband/petitioner has failed to prove that the wife/respondent was pregnant at the time of the marriage and was carrying some other person's child and also came to the conclusion that the husband had failed to prove that he had no access to the wife at the time when the child was begotten. Hence the present appeal.

The undisputed facts are that the marriage between the parties took place on 15.5.1997. According to the husband, the first coitus between him and his wife took place on 17.5.1997. According to the wife, the first coitus took place on 16.5.1997. A girl child was born to the wife on 14.11.1997. It is apparent that the child was born within 182 days of the husband and wife first having sexual intercourse. The plea of the husband is that the child is not his and the child was born after a normal period of pregnancy of 9-1/2 months and therefore, it is obvious that the wife was pregnant at the time of marriage by some other person and this fact had not been disclosed to him. The plea of the wife as noticed above is that the child which was born was a premature child born six months after conception.

To appreciate the rival contentions of the parties, it would be appropriate to refer to Section 112 of the Indian Evidence Act, which reads as follows:

> **"S.112. Birth during marriage conclusive proof of legitimacy** –
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> The fact that any person was born during the continuance of a valid marriage between his mother and ay man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that [that (he)] is the legitimate son of that man, unless it can be shown that [the parties to the marriage] had no access to [each other] at any time when (he) could have been begotten."

The law presumes strongly in favour of legitimacy of an off spring, as it is birth that determines the status of a person. The section recognizes and embodies the well settled principle of common law that a child born during the subsistence of the marriage or during 280 days after its delivery shall be conclusive proof that it is a legitimate child, unless it is proved by clear and strong evidence that the husband and wife did not or could not have any access at the time when the child could have been begotten. The word 'begotten' has been used synonymously with conception. The presumption of legitimacy arises from birth in wedlock and not from conception. A very strong protection is provided for the lawfully constituted family and to the progeny born out of such wedlock. The only exception to this is if the husband can show that he had no access to the wife at the time when the child could have been begotten. "Non-access" in this

section not only means lack of physical access but also may include other factors and such physical disability rendering it impossible to procreate.

It is a well settled principle that the law leans in favour of validity of marriage and in favour of legitimacy and not illegitimacy or bastardy. However, the section itself provides an exception to the rule. The latter part of the section indicates that conclusive proof will not arise and shall not be made under Section 112, if it is shown and established by the person denying the paternity that the parties to the marriage had no access to each other at the time when the child could have been begotten. Very convincing evidence has to be brought on record to rebut this presumption. The evidence must be strong, distinct, clear, satisfactory and conclusive.

A number of judgments have been cited in this regard. In **Mahendra Manilal** v. **Sushila Mahendra Nanavati** , AIR 1965 SC 364, the apex Court held as follows:-

> "In a petition for annulment of marriage on the ground mentioned in S. 12(1)(d), the petitioner has in order to succeed, to prove beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage. It is, however, not correct in law in holding that the court, in these proceedings, could in no circumstances base its decision on an admission of the parties. What the Court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by someone else at the time of the marriage. The petitioner has to establish such facts and circumstances which would lead the

> Court either to believe that the respondent was pregnant at the time of marriage by someone else or to hold that a prudent man would, on those facts and circumstances, be completely satisfied that it was so.
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> Xxxxx xxxxx xxxxx xxxxx
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> The usual period of gestation from the date of the first coitus is between 265 and 270 days and delivery is expected in about 280 days from the first day of the menstruation period prior to a woman conceiving a child. Where the child was born after 171 days of the first coitus between the husband and wife, and the child and the delivery was normal, normally the court should hold that the child was not a child born after 171 days gestation and was not the child of the husband, unless there is evidence which would justify the court in holding otherwise."

The Court also held that it was not necessary to challenge the character of the mother to rebut the conclusion arrived at from various circumstances.

Reliance has also been placed on **Smt.Dukhtar Jahan** v. **Mohammed Farooq,** AIR 1987 SC 1040. The apex Court was dealing with a matter under Section 125 Cr.P.C. and it held that the child born 7 months after the date of marriage could not be said to be an illegitimate child. The Court held that giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event. The court further went on to hold that proceedings under Section 125 Cr.P.C. were of summary nature and the question whether the child was legitimate or illegitimate should have been decided in civil proceedings and not in summary proceedings.

This legal position has been recognized in **Satya Devi** v. **Brij Lal,** 1994 (2) Sim.L.C. 263, where the child was born after 220 days. In **Partap v. Veena,** 1997 (1) HLR 110, a Division Bench of this Court accepted the plea that the child which was born after 204 days was a premature child and, therefore, rejected the contention of the husband that the child was illegitimate.

The law has been summed up by the apex Court in **Smt. Kamti Devi and another** v. **Poshi Ram**, AIR 2001 SC 2226, as follows:-

> " 10, But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

In the present case, as is apparent from the material on record, the child was born after 182 days from the first coitus between the parties. The normal period of delivery is 280 days or

40 weeks which is equivalent to 12 lunar months. The menstrual circle of a normal woman is 28 days and if the period is longer or shorter in a particular woman, the period of pregnancy may also be less or more. However, even after making allowances for such variations, the normal period of pregnancy is between 260 to 300 days.

Modi in his treatise on Medical Jurisprudence and Toxicology 22nd edition, points out that the children born at or after 210 days or 7 calendar months of uterine life are viable, i.e. are born alive and are capable of being reared. However, it is very rare for a child born before the period of seven months to survive or to live long. There are some reported cases where even a child born after six months of pregnancy has survived, but in all these cases, there is evidence to show that there was premature delivery and special care of the child was taken and then the child survived. A child born after 180 days of conception as per medical experts will invariably be a very weak and small child and his weight shall be very low and even length of the child would be much less than that of a normal child.

It is in the light of the aforesaid law and established medical opinion that I shall consider the evidence led by the parties in this case.

According to the husband, his wife gave a birth to a female child after normal gestation period on 14.11.1997 only after 182 of coitus days and therefore, the child is illegitimate. The wife in her statement took the defence that the child was premature at the time of birth. She in her written statement had averred that when

her husband came on leave in November, 1997 she told him that she was not feeling well and was taken to the hospital where the doctor had advised that her physical condition was weak and she will give birth to a premature child. However, the husband took her to his home where she delivered a child.

From the material, it is obvious that after the marriage, her husband left to join his duty on 24.5.1997. According to him, he again came on leave in the month of August, 1997 and he remained with the respondent/wife from 5.8.1997 to 17.8.1997 and both of them lived as husband and wife. The husband again came on leave on 8.11.1997 and he reached his house on 11.11.1997. Three days later, the respondent/wife gave birth to a female child on 14.11.1997. According to the husband, the child born was a normal child and his wife had not disclosed to him that she was pregnant before marriage. He denied the suggestion that the child was born after premature delivery or that the child was reared with great difficulty. He has stated that the child immediately after birth, was breastfed by the mother. He also states that since he was disputing the paternity of the child a Panchayat was called and then the wife left for her maternal house.

PW2 Roop Lal is the father of the husband. He stated that the wife delivered a normal female child within six months of the marriage. According to him, the child was normal and healthy. He further states that after the delivery of the child, two midwives (Dai) Himanshru Devi and Banti Devi had been engaged for delivering the child. He further states that the child was breastfed

and bathed after birth. On 16.11.1997, he called for a Panchayat of the villagers and according to him the wife admitted that the child was born from the loins of some other person whom she did not name. He denied the suggestion that the child born was a premature child.

PW3 is midwife Himanshru Devi. She states that she is working as midwife (Dai) for the last 50 – 60 years and she has dealt with hundreds of deliveries in her village. She further states that she had delivered the child from the wife of Maya Ram and a girl was born. The child was normal. She bathed the child and the respondent/wife breastfed the child. According to her she was looking after the mother and child. In cross-examination, she admitted that she has not received any training from any hospital. She has also admitted that Banti Devi is her daughter.

PW4 is Chamaru Ram, who states that a Panchayat was called on 16.11.1997 in the presence of Ward Members wherein the wife had admitted that the child was not that of the appellant-husband but refused to name the person from whom the child was begotten.

On the other hand, the wife has examined herself. She in her statement clearly stated that she and her husband first had sexual intercourse on 16.5.1997. She also states that the husband and his family by force made her write that her husband is not the father of the child. She further states that since her life was at risk, she had written this statement. According to her, the child born was premature and was kept in cotton wool. After four days, she has left at her parents' house. In cross-examination, she denied that

Banti Devi was also there as a Dai (midwife) but admitted that Himanshru Devi, Dai (midwife) was there, though according to her, Himanshru Devi only came for one day. She further stated that when she was at her parent's house nobody came to look-after her and her child. She has denied the suggestion that the child was being breastfed or that the child was healthy after normal delivery. She has admitted that Panchayat did take place but she has denied that before the Panchayat she admitted that Maya Ram was not the father of the child. She has stated that she is not willing to undergo DNA test herself or of the child but if the court directs she will undergo the same.

RW 2 is Leela Devi . According to her, she is working as Dai (midwife). She states that she looked after the minor child of the wife for about three months at her parents' house. The child was kept in cotton wool and was fed milk with the help of a cotton wick. In cross-examination, she states that she had got the child checked up in the government hospital. She, however, could not name the doctor who examined the child. She admits that a slip was prepared before the child was examined. She states that she took the job three days after the wife reached her parent's house. She has admitted that she has not received any training of Dai (midwife). She stated that she did not know the names of the persons in whose houses she has worked as Dai. This is the entire evidence on record.

From the evidence led by the husband, it is apparent that immediately after the child was born, the husband denied the paternity of the child and he and his family member called for a

Panchayat. This fact is not denied by the wife. According to Chamaru Ram, before the Panchayat, the wife admitted that Maya Ram was not the father of the child. The husband also states that writing in this behalf was prepared but no such writing has been proved in Court. However, the wife in her examination-in-chief has stated that she did sign such writing though according to her she signed the same under duress.

Himanshru Devi is admittedly a Dai who was present at the time of birth of the child. She is more than 75 years of age. She has stated in her examination-in-chief that she has vast experience as midwife (Dai) and this fact has not been denied by the wife. She has clearly stated that the child was born, was a normal child.

On the other hand, the statement of RW2 Leela Devi who was engaged by the wife does not inspire confidence. She could not name even a single person with whom she had worked as Dai.

If the version of the wife is believed that the child was born just after 180 days of gestation, the child as per medical experts would have been a very weak child. Such a child could not have been looked-after only by a Dai (midwife) If the child was premature, it was necessary to take such a child to a dispensary or a hospital. Even though Leela Devi admits in her statement that the child was taken to hospital but no evidence has been led by the wife to show whether the child was ever got checked up in any hospital.

In the written statement, the wife had averred that before the birth, the wife was taken to a doctor who had stated that she is weak and will deliver a premature child. The wife in her

statement in Court did not state anything in this regard nor any doctor has been examined. It is extremely difficult to believe that a child born only after 182 days of conception could have survived without adequate medical help. No doubt, there are some cases in which it is recorded that in rare instances, the children born at this stage may survive but in all these cases there is sufficient material to show how the child has survived. It is impossible to believe that the child born only after 6 months of pregnancy would survive without any medical aid whatsoever. Surprisingly, the wife has not cared to examine any of her family members. Admittedly, the wife reached her parent's home three days after the child was born. It was only her parents and other family members who would have given the best evidence as to what was the condition of the child and how the child was brought up.

No doubt, the onus to discharge the burden to rebut the conclusive proof under Section 112 of the Indian Evidence Act is on the husband but in a case like the present where admittedly the child is born within six months of coitus, the husband has discharged the initial onus. The wife could have led evidence with regard to the weight, length and health of the child by leading independent evidence. The only independent evidence is of Leela Devi which does not inspire confidence.

On behalf of the husband, it has been urged that both before the trial Court as well as before this Court the husband has been urging that he is ready to undergo any DNA test and the wife be asked to get the DNA test of herself and her child.

As far as this aspect of the matter is concerned, the apex Court in **Goutam Kundu v. State of West Bengal,** AIR 1993 SC 2295, held as follows:

> "26. From the above discussion it emerges:-
> (1) that courts in India cannot order blood test as a matter of course;
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
> (3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section112 of the Evidence Act;
> (4) the Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;
> (5) no one can be compelled to give sample of blood for analysis.

It would, however, be pertinent to mention that this judgment was given in the context of blood grouping test to determine paternity. The Court held that such a test was not a conclusive test and therefore, gave the aforesaid directions.

A Division Bench of Kerala High Court in **A.T.Mathew** v. **Annamma Mathew**, 1995(1) HLR 603 held that in view of the words "conclusive proof" used by the legislature in Section 112, there is no question of rebuttal of this conclusive proof. Therefore, if the birth of the child has taken place during the continuance of a valid marriage between the mother and any man, the legitimacy of the child vis-à-vis the man is to be deemed as 'conclusive

proof' and no question of permitting rebuttal evidence to prove the legitimacy arises. However, the Kerala High Court recognized that the single exception when rebuttal evidence can be adduced is where the parties to the marriage had no access to each other at the time when the child could have begotten. The Kerala High Court, therefore, held that if the child is born during the continuance of a valid marriage, the question of permitting rebuttal evidence by DNA -finger-printing does not arise

The apex Court also dealt with the matter in **Smt. Kamti Devi v. Poshi Ram,** AIR 2001 SC 226, and held as follows:-

> "11.We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act. E.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may took hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. "

It is apparent that the apex Court recognized that the DNA test is more or less a conclusive test but the Supreme Court has held that if there is access between the husband and wife then the conclusive proof under Section 112 cannot be rebutted whatever be the result of the DNA test. This, however, does not mean that the DNA test cannot be ordered under any circumstances. Where in a case like the present case, there is a great doubt with regard to the paternity of the child, it may sometimes be in the interest of the child to go in for a DNA test. No doubt, the court cannot compel any party to lead evidence itself and it may not be appropriate for the court to direct any party to undergo the said test but in case a party does not undergo for the test, an adverse inference can be drawn in some peculiar circumstances.

In **Mrs. Kanchan Bedi and another** v. **Gurpreet Singh Bedi,** AIR 2003 Del 446, the Court directed the father to undergo DNA test to ascertain the paternity of the child. However, the Delhi High Court in **Mrs. Teeku Dutta v. State and another,** AIR 2004 SC 205 went on to hold that the party could not be ordered to undergo DNA test. The Bombay High Court in **Sunil Eknaath Trambake** v. **Leelavati Snil Trambake,** AIR 2006 SC 140 held as follows:-

> "Merely because either of the parties have disputed a factum of paternity does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity

> and only if the court finds it impossible to draw an inference or adverse inference on the basis of such evidence on record or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving case, where such a test becomes indispensable to resolve the controversy the court can direct such test. DNA test, in any case, cannot be directed as a matter of routine. The courts should record reasons as to how and why such test in the case is necessary to resolve the controversy and is indispensable. That is necessary since a result of such test, in matrimonial and succession cases, being negative will have an effect of branding a child as a bastard and the mother as an unchaste woman as noted. That may also adversely affect the child psychologically. The courts, however, should not hesitate to direct DNA test if it is in the best interest of a child."

In **Joseph & etc.** v. **State of Kerala & others,** AIR 2006 Kerala 191, a Division Bench upheld the decision of the Kerala Women's Commission ordering DNA test by the doctor of the wife and the child.

After considering the entire case law, I am of the view that the court cannot force any party to undergo a DNA test except in certain exceptional cases. However, where the wife asserts that the child born is that of the husband and like in the present case where the husband has led sufficient evidence to show that he had no access to the wife at the time of conception of the child and the wife refuses to undergo DNA test and also refuses to permit the child to undergo DNA test then an adverse inference

can be drawn that she wants to avoid the DNA test being conducted.

Keeping in view the aforesaid facts and discussions, I am of the view that in the present case, the husband has led cogent, reliable and convincing evidence to prove beyond reasonable doubt that he had no access to the wife at the time when the female child was begotten. In my considered view, it stands proved on record that the child was born after a normal period of gestation and since the child was born within six months of the marriage, the respondent/wife was pregnant at the time of the marriage and this fact was not disclosed by her to her husband and his family and, therefore, the husband is entitled for a decree of annulment of the marriage. It is, therefore, ordered that the marriage entered into between the parties solemnized on 15.5.1997 is annulled by granting a decree of annulment on the ground that the respondent-wife was at the time of marriage pregnant by some person other than the husband.

The appeal is allowed in the aforesaid terms. Decree sheet be drawn up accordingly. No order as to costs.

October 5, 2007 (Deepak Gupta),J.

s.